

Assembly Bill No. 958

Passed the Assembly September 2, 2009

Chief Clerk of the Assembly

Passed the Senate August 31, 2009

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2009, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to add and repeal Section 21568 of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

AB 958, Eng. Design-build: Metropolitan Water District of Southern California: solar energy systems.

Existing law sets forth requirements for the solicitation and evaluation of bids and the awarding of contracts by public entities for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement. Existing law also authorizes specified state agencies, cities, and counties to implement alternative procedures for the awarding of contracts on a design-build basis.

This bill would authorize the Metropolitan Water District of Southern California to enter into design-build contracts for projects involving the design, construction, fabrication, and installation of a solar energy system in excess of \$1,000,000, in accordance with specified provisions. The bill would establish a procedure for submitting bids that includes a requirement that design-build entities provide a statement of qualifications submitted to the district that is verified under oath. Because a verification under oath is made under penalty of perjury, the bill would, by requiring a verification, create a new crime and thereby impose a state-mandated local program. The bill would require the district, if it uses the design-build method on a project, to submit a report to the Legislative Analyst's Office, as specified, and would require the Legislative Analyst's Office to report to the Legislature on the use of the design-build method on or before January 1, 2015. The bill would repeal these provisions on January 1, 2016.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 21568 is added to the Public Contract Code, to read:

21568. (a) (1) Notwithstanding the requirements of Section 21565, this section provides an alternative procedure that the district may utilize in the design, construction, fabrication, and installation of a solar energy system, including ancillary improvements directly related to the solar energy system, in excess of one million dollars (\$1,000,000).

(2) The district may award a project under this section using either the lowest responsible bidder or by best value.

(b) (1) It is the intent of the Legislature to enable the district to utilize cost-effective options for the installation of solar energy facilities.

(2) It is the intent of the Legislature to provide an alternative and optional procedure for bidding and building solar construction projects for the district.

(c) The design-build approach authorized by this section may be used, but is not limited to use, when it is anticipated that it will do any of the following:

(1) Reduce project cost.

(2) Expedite project completion.

(3) Provide design features not achievable through the design-bid-build method.

(d) (1) For contracts awarded prior to the effective date of either the regulations adopted by the Department of Industrial Relations pursuant to subdivision (b) of Section 1771.55 of the Labor Code or the fees established by the department pursuant to paragraph (2), if the district elects to proceed under this section, the district shall establish and enforce, for design-build projects, a labor compliance program containing the requirements outlined in Section 1771.5 of the Labor Code, or it shall contract with a third party to operate a labor compliance program containing the requirements outlined in Section 1771.5 of the Labor Code. This requirement shall not apply to any project where the district or the design-build entity has entered into any collective bargaining agreement or agreements that bind all of the contractors performing work on the projects.

(2) For contracts awarded on or after the effective date of both the regulations adopted by the Department of Industrial Relations pursuant to subdivision (b) of Section 1771.55 of the Labor Code and the fees established by the department pursuant to this paragraph, the district shall pay a fee to the department, in an amount that the department shall establish, and as it may from time to time amend, sufficient to support the department's costs in ensuring compliance with and enforcing prevailing wage requirements on the project, and labor compliance enforcement as set forth in subdivision (b) of Section 1771.55. All fees collected pursuant to this paragraph shall be deposited in the State Public Works Enforcement Fund created by Section 1771.3 of the Labor Code, and shall be used only for enforcement of prevailing wage requirements on those projects.

(3) The Department of Industrial Relations may waive the fee set forth in paragraph (2) if the district has previously been granted approval by the director to initiate and operate a labor compliance program on its projects and requests to continue to operate that labor compliance program on its projects in lieu of labor compliance by the department pursuant to subdivision (b) of Section 1771.55. The fee shall not be waived for the district if it contracts with a third party to initiate and enforce labor compliance programs on its projects.

(e) As used in this section, the following terms have the following meanings:

(1) "Best value" means a value determined by objectives relative to price, features, functions, and life-cycle costs.

(2) "Design-build" means a procurement process in which both the design and construction of a project are procured from a single entity.

(3) "Design-build entity" means a partnership, corporation, or other legal entity that is able to provide appropriately licensed contracting, architectural, and engineering services, as needed, pursuant to a design-build contract.

(4) "Project" means the construction of solar energy installations at regional or local water facilities including ancillary improvements directly related to the solar energy system.

(f) Design-build projects shall progress in a four-step process, as follows:

(1) (A) The district shall prepare a set of documents setting forth the scope of the project. The documents may include, but are not limited to, the size, type, and desired design character of the solar energy system, performance specifications covering the quality of materials, equipment, and workmanship, preliminary plans or building layouts, or any other information deemed necessary to describe adequately the district's needs. The performance specifications and any plans shall be prepared by a design professional who is duly licensed and registered in California.

(B) Any architect or engineer retained by the district to assist in the development of the project-specific documents shall not be eligible to participate in the preparation of a bid with any design-build entity for that project.

(2) (A) Based on the documents prepared pursuant to paragraph (1), the district shall prepare a request for proposals that invites interested parties to submit competitive sealed proposals in the manner prescribed by the district. The request for proposals shall include, but is not limited to, the following elements:

(i) Identification of the basic scope and needs of the project or contract, the expected cost range, and other information deemed necessary by the district to inform interested parties of the contracting opportunity, including, but not limited to, the methodology that will be used by the district to evaluate proposals, and, specifically, if the contract will be awarded to the lowest responsible bidder.

(ii) Significant factors that the district reasonably expects to consider in evaluating proposals, including cost or price and all nonprice-related factors.

(iii) The relative importance of weight assigned to each of the factors identified in the request for proposals.

(B) With respect to clause (iii) of subparagraph (A), if a nonweighted system is used, the agency shall specifically disclose whether all evaluation factors, other than cost or price, when combined are:

(i) Significantly more important than cost or price.

(ii) Approximately equal in importance to cost or price.

(iii) Significantly less important than cost or price.

(C) If the district chooses to reserve the right to hold discussions or negotiations with responsive bidders, it shall so specify in the

request for proposal and shall publish separately, or incorporate into the request for proposal, applicable rules and procedures to be observed by the district to ensure that any discussions or negotiations are conducted in good faith.

(3) (A) The district shall establish a procedure to prequalify design-build entities using a standard questionnaire developed by the district. In preparing the questionnaire, the district shall consult with the construction industry, including representatives of the building trades and surety industry. This questionnaire shall require information, including, but not limited to, all of the following:

(i) If the design-build entity is a partnership, limited partnership, or other association, a listing of all of the partners, general partners, or association members known at the time of bid submission who will participate in the design-build contract, including, but not limited to, mechanical subcontractors.

(ii) Evidence that the members of the design-build entity have completed, or demonstrated the experience, competency, capability, and capacity to complete projects of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project, as well as a financial statement that assures the district that the design-build entity has the capacity to complete the project.

(iii) The licenses, registration, and credentials required to design and construct the project, including information on the revocation or suspension of any license, credential, or registration.

(iv) Evidence that establishes that the design-build entity has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance.

(v) Any prior serious or willful violation of the California Occupational Safety and Health Act of 1973, contained in Part 1 (commencing with Section 6300) of Division 5 of the Labor Code or the federal Occupational Safety and Health Act of 1970 (Public Law 91-596), settled against any member of the design-build entity, and information concerning workers' compensation experience history and worker safety program.

(vi) Information concerning any debarment, disqualification, or removal from a federal, state, or local government public works project. Any instance where an entity, its owners, officers, or managing employees submitted a bid on a public works project

and were found to be nonresponsive, or were found by an awarding body not to be a responsible bidder.

(vii) Any instance where the entity, its owners, officers, or managing employees defaulted on a construction contract.

(viii) Any violations of the Contractors' State License Law (Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code), excluding alleged violations of federal or state law including the payment of wages, benefits, apprenticeship requirements, or personal income tax withholding, or of Federal Insurance Contribution Act (FICA; 26 U.S.C. Sec. 3101 et seq.) withholding requirements settled against any member of the design-build entity.

(ix) Information concerning the bankruptcy or receivership of any member of the design-build entity, including information concerning any work completed by a surety.

(x) Information concerning all settled adverse claims, disputes, or lawsuits between the owner of a public works project and any member of the design-build entity during the five years preceding submission of a bid pursuant to this section, in which the claim, settlement, or judgment exceeds fifty thousand dollars (\$50,000). Information shall also be provided concerning any work completed by a surety during this period.

(xi) In the case of a partnership or other association that is not a legal entity, a copy of the agreement creating the partnership or association and specifying that all partners or association members agree to be fully liable for the performance under the design-build contract.

(B) The information required pursuant to this subdivision shall be verified under oath by the entity and its members in the manner in which civil pleadings in civil actions are verified. Information that is not a public record pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) shall not be open to public inspection.

(4) The district shall establish a procedure for final selection of the design-build entity. Selection shall be based on either of the following criteria:

(A) A competitive bidding process resulting in lump-sum bids by the prequalified design-build entities. Awards shall be made to the lowest responsible bidder.

(B) The district may use a design-build competition based upon best value and other criteria set forth in paragraph (2). The design-build competition shall include the following elements:

(i) Competitive proposals shall be evaluated by using only the criteria and selection procedures specifically identified in the request for proposal. However, the following minimum factors shall each represent at least 10 percent of the total weight of consideration given to all criteria factors: price, technical design and construction expertise, life-cycle costs over 15 years or more, skilled labor force availability, and acceptable safety record. Each of these factors shall be weighted equally.

(ii) Once the evaluation is complete, the top three responsive bidders shall be ranked sequentially from the most advantageous to the least.

(iii) The award of the contract shall be made to the responsible bidder whose proposal is determined, in writing, to be the most advantageous.

(iv) Notwithstanding any provision of this code, upon issuance of a contract award, the district shall publicly announce its award, identifying the contractor to whom the award is made, along with a written decision supporting its contract award and stating the basis of the award. The notice of award shall also include the district's second and third ranked design-build entities.

(v) For purposes of this paragraph, "skilled labor force availability" shall be determined by the existence of an agreement with a registered apprenticeship program, approved by the California Apprenticeship Council, which has graduated apprentices in each of the preceding five years. This graduation requirement shall not apply to programs providing apprenticeship training for any craft that has been deemed by the Department of Labor and the Department of Industrial Relations to be an apprenticeable craft in the five years prior to enactment of this act.

(vi) For the purposes of this paragraph, a bidder's "safety record" shall be deemed "acceptable" if their experience modification rate for the most recent three-year period is an average of 1.00 or less, and their average total recordable injury/illness rate and average lost work rate for the most recent three-year period does not exceed the applicable statistical standards for its business category, or if the bidder is a party to an alternative dispute

resolution system, as provided for in Section 3201.5 of the Labor Code.

(g) (1) Any design-build entity that is selected to design and build a project pursuant to this section shall possess or obtain sufficient bonding to cover the contract amount for nondesign services and errors and omissions insurance coverage sufficient to cover all design and architectural services provided in the contract. This section does not prohibit a general or engineering contractor from being designated the lead entity on a design-build entity for the purposes of purchasing necessary bonding to cover the activities of the design-build entity.

(2) Any payment or performance bond written for the purposes of this section shall be written using a bond form developed by the district.

(h) All subcontractors that were not listed by the design-build entity in accordance with clause (i) of subparagraph (A) of paragraph (3) of subdivision (f) shall be awarded by the design-build entity in accordance with the design-build process set forth by the district in the design-build package. All subcontractors bidding on contracts pursuant to this section shall be afforded the protections contained in Chapter 4 (commencing with Section 4100) of Part 1. The design-build entity shall do both of the following:

(1) Provide public notice of the availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process of the district.

(2) Provide a fixed date and time on which the subcontracted work will be awarded in accordance with the procedure established pursuant to this section.

(i) The minimum performance criteria and design standards established pursuant to paragraph (1) of subdivision (f) shall be adhered to by the design-build entity. Any deviations from those standards may only be allowed by written consent of the district.

(j) The district may retain the services of a design professional or construction project manager, or both, throughout the course of the project in order to ensure compliance with this section.

(k) Contracts awarded pursuant to this section shall be valid until the project is completed.

(l) Nothing in this section is intended to affect, expand, alter, or limit any rights or remedies otherwise available at law.

(m) Nothing in this section shall affect either of the following:

(1) The restrictions on subcontracting imposed by the district's merit system, or any memorandum of understanding or operating policy.

(2) The obligation of the district to meet and confer with any employee organization concerning a matter within the statutory scope of representation.

(n) Any design-build project procured under this section shall provide for training of the permanent employees of the district to maintain and repair the project once completed.

(o) (1) If the district elects to award a project pursuant to this section, retention proceeds withheld by the district from the design-build entity shall not exceed 5 percent if a performance and payment bond, issued by an admitted surety insurer, is required in the solicitation of bids.

(2) In a contract between the design-build entity and the subcontractor, and in a contract between a subcontractor and any subcontractor thereunder, the percentage of the retention proceeds withheld shall not exceed the percentage specified in the contract between the district and the design-build entity. If the design-build entity provides written notice to any subcontractor who is not a member of the design-build entity, prior to or at the time the bid is requested, that a bond may be required and the subcontractor subsequently is unable or refuses to furnish a bond to the design-build entity, then the design-build entity may withhold retention proceeds in excess of the percentage specified in the contract between the district and the design-build entity from any payment made by the design-build entity to the subcontractor.

(p) (1) The authority for design-build projects contained in this section is a new and independent authorization and shall not supersede, limit, or restrict any other statutory design-build authorization.

(2) Nothing in this section shall be construed to change the authority of a state department, agency, board, or commission.

(3) The district may use state funds for projects utilizing the design-build procedure under this section.

(4) Except as provided in this section, nothing in this section shall be construed to affect the application of any other law.

(q) A district that elects to proceed under this section and uses the design-build method on a project shall submit to the Legislative

Analyst's Office before December 1, 2014, a report containing a description of each project procured through the design-build process that is completed after January 1, 2011, and before November 1, 2014. The report shall include, but shall not be limited to, all of the following information:

- (1) The type of project.
- (2) The gross square footage of the project.
- (3) The design-build entity that was awarded the project.
- (4) The estimated and actual project costs.
- (5) A description of any written protests concerning any aspect of the solicitation, bid, proposal, or award of the design-build project, including the resolution of the protests.
- (6) An assessment of the prequalification process and criteria.
- (7) An assessment of the effect of retaining 5 percent retention on the project.
- (8) A description of the Labor Force Compliance Program and an assessment of the project impact, where required.
- (9) A description of the method used to award the contract. If the best value method was used, the report shall describe the factors used to evaluate the bid, including the weighting of each factor and an assessment of the effectiveness of the methodology.
- (10) An assessment of the project impact of "skilled labor force availability."
- (11) An assessment of the most appropriate uses for the design-build approach.
- (r) A district that elects not to use the authority granted by this section may submit a report to the Legislative Analyst's Office explaining why the district elected not to use the design-build method.
- (s) On or before January 1, 2015, the Legislative Analyst's Office shall report to the Legislature on the use of the design-build method by the district pursuant to this section, including the information listed in subdivision (q). The report may include recommendations for modifying or extending this section.
- (t) This section shall remain in effect only until January 1, 2016, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2016, deletes or extends that date.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school

district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Approved _____, 2009

Governor